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6 UNITED STATES DISTRICT COURT  
7 DISTRICT OF NEVADA

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9 WILSON O. PETERS,

10 Petitioner,

11 v.

12 DWIGHT NEVEN, et al.,

13 Respondents.

Case No. 2:14-cv-01055-RFB-VCF

ORDER

14 Wilson O. Peters' counseled, first-amended 28 U.S.C. § 2254 habeas corpus  
15 petition comes before the court for adjudication on the merits (ECF No. 8).

16 **I. Procedural History and Background**

17 On May 26, 2010, a jury convicted Peters of count 1: battery with use of a deadly  
18 weapon and count 2: assault with a deadly weapon (exhibit 15 to first-amended petition,  
19 ECF No. 8).<sup>1</sup> The state district court sentenced Peters as a habitual criminal to a term of  
20 ten years to life on each count, to run concurrently. Exh. 17. Judgment of conviction was  
21 filed on October 20, 2010. Exh. 18.

22 Peters timely appealed; on February 24, 2012, the Nevada Supreme Court  
23 affirmed the convictions, and remittitur issued on March 20, 2012. Exhs. 20, 23, 24.

24 Peters filed a proper person motion for appointment of counsel on July 11, 2012,  
25 and the state district court appointed counsel for state post-conviction proceedings. Exh.  
26 25. Peters filed a counseled state postconviction petition for a writ of habeas corpus on  
27

28 <sup>1</sup> Exhibits referenced in this order are exhibits to petitioner's first-amended petition, ECF No. 8, and are found at ECF Nos. 9-12, 28, 42, 45.

1 December 22, 2012. Exh. 26. On May 12, 2014, the Nevada Supreme Court affirmed  
2 the denial of the petition, and remittitur issued on June 9, 2014. Exhs. 36, 37.

3 On February 29, 2016, this court granted respondents' motion to dismiss in part,  
4 dismissing the state-law claim of redundant convictions in ground 1 (ECF No. 34).  
5 Respondents have now answered the claims remaining before the court (ECF No. 37),  
6 and Peters replied (ECF No. 44).

7 **II. AEDPA Standard of Review**

8 28 U.S.C. § 2254(d), a provision of the Antiterrorism and Effective Death Penalty  
9 Act (AEDPA), provides the legal standards for this court's consideration of the petition in  
10 this case:

11 An application for a writ of habeas corpus on behalf of a person in  
12 custody pursuant to the judgment of a State court shall not be granted with  
13 respect to any claim that was adjudicated on the merits in State court  
proceedings unless the adjudication of the claim —

14 (1) resulted in a decision that was contrary to, or involved an  
unreasonable application of, clearly established Federal law, as determined  
15 by the Supreme Court of the United States; or

16 (2) resulted in a decision that was based on an unreasonable  
17 determination of the facts in light of the evidence presented in the State  
court proceeding.

18 The AEDPA "modified a federal habeas court's role in reviewing state prisoner  
19 applications in order to prevent federal habeas 'retrials' and to ensure that state-court  
20 convictions are given effect to the extent possible under law." *Bell v. Cone*, 535 U.S. 685,  
21 693-694 (2002). This court's ability to grant a writ is limited to cases where "there is no  
22 possibility fair-minded jurists could disagree that the state court's decision conflicts with  
23 [Supreme Court] precedents." *Harrington v. Richter*, 562 U.S. 86, 102 (2011). The  
24 Supreme Court has emphasized "that even a strong case for relief does not mean the  
25 state court's contrary conclusion was unreasonable." *Id.* (citing *Lockyer v. Andrade*, 538  
26 U.S. 63, 75 (2003)); see also *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) (describing  
27 the AEDPA standard as "a difficult to meet and highly deferential standard for evaluating  
28

1 state-court rulings, which demands that state-court decisions be given the benefit of the  
2 doubt”) (internal quotation marks and citations omitted).

3 A state court decision is contrary to clearly established Supreme Court precedent,  
4 within the meaning of 28 U.S.C. § 2254, “if the state court applies a rule that contradicts  
5 the governing law set forth in [the Supreme Court’s] cases” or “if the state court confronts  
6 a set of facts that are materially indistinguishable from a decision of [the Supreme Court]  
7 and nevertheless arrives at a result different from [the Supreme Court’s] precedent.”  
8 *Lockyer*, 538 U.S. at 73 (quoting *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000), and  
9 citing *Bell*, 535 U.S. at 694.

10 A state court decision is an unreasonable application of clearly established Supreme  
11 Court precedent, within the meaning of 28 U.S.C. § 2254(d), “if the state court identifies  
12 the correct governing legal principle from [the Supreme Court’s] decisions but  
13 unreasonably applies that principle to the facts of the prisoner’s case.” *Lockyer*, 538 U.S.  
14 at 74 (quoting *Williams*, 529 U.S. at 413). The “unreasonable application” clause requires  
15 the state court decision to be more than incorrect or erroneous; the state court’s  
16 application of clearly established law must be objectively unreasonable. *Id.* (quoting  
17 *Williams*, 529 U.S. at 409).

18 To the extent that the state court’s factual findings are challenged, the “unreasonable  
19 determination of fact” clause of § 2254(d)(2) controls on federal habeas review. *E.g.*,  
20 *Lambert v. Blodgett*, 393 F.3d 943, 972 (9th Cir.2004). This clause requires that the  
21 federal courts “must be particularly deferential” to state court factual determinations. *Id.*  
22 The governing standard is not satisfied by a showing merely that the state court finding  
23 was “clearly erroneous.” 393 F.3d at 973. Rather, AEDPA requires substantially more  
24 deference:

25 .... [I]n concluding that a state-court finding is unsupported by substantial  
26 evidence in the state-court record, it is not enough that we would reverse in  
27 similar circumstances if this were an appeal from a district court decision.  
28 Rather, we must be convinced that an appellate panel, applying the normal  
standards of appellate review, could not reasonably conclude that the  
finding is supported by the record.

1           *Taylor v. Maddox*, 366 F.3d 992, 1000 (9th Cir.2004); *see also Lambert*, 393 F.3d  
2 at 972.

3           Under 28 U.S.C. § 2254(e)(1), state court factual findings are presumed to be  
4 correct unless rebutted by clear and convincing evidence. The petitioner bears the burden  
5 of proving by a preponderance of the evidence that he is entitled to habeas relief. *Cullen*,  
6 563 U.S. at 181.

### 8           **III.     Instant Petition**

#### 9           **Ground 1**

10           The remaining claim in ground 1 is that Peters' sentence violates the Fifth  
11 Amendment's protection against double jeopardy (ECF No. 8, pp. 11-14). He argues that  
12 he was convicted of both assault and battery for stabbing Stewart Gibson with a small  
13 kitchen knife based on a) the actual stabbing, and b) placing Gibson in a state of  
14 reasonable apprehension of immediate bodily harm just prior to stabbing him.

15           The Fifth Amendment's Double Jeopardy Clause prohibits multiple punishments  
16 for the same offense. U.S. Const. amend. V. To determine whether two offenses are the  
17 "same" for double jeopardy purposes, a court must consider "whether each offense  
18 contains an element not contained in the other; if not, they are the 'same offense' and  
19 double jeopardy bars additional punishment and successive prosecution." *United States*  
20 *v. Dixon*, 509 U.S. 688, 696 (1993) (citing *Blockburger v. United States*, 284 U.S. 299,  
21 304 (1932)). "Conversely, '[d]ouble jeopardy is not implicated so long as each violation  
22 requires proof of an element which the other does not.'" *Wilson v. Belleque*, 554 F.3d  
23 816, 829 (9th Cir. 2009) (quoting *United States v. Vargas-Castillo*, 329 F.3d 715, 720 (9th  
24 Cir. 2003). "If each [offense] requires proof of a fact that the other does not, the  
25 *Blockburger* test is satisfied, notwithstanding a substantial overlap in the proof offered to  
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28

1 establish the crimes.” *Id.* (quoting *Iannelli v. United States*, 420 U.S. 770, 785-86 n.17  
2 (1975). the “same act or transaction” can “constitute a violation of two distinct statutory  
3 provisions.” *Blockburger*, 284 U.S. at 304.

4 Gibson testified at trial that Peters lunged at him, attempted several times to stab  
5 him, stabbed him above his hip and cut his forearm as he tried to block the attack, and  
6 that he was able to avoid Peters’ last couple of attempts to stab him. Exh. 12, pt. 1, p.  
7 68-69.

8  
9 In rejecting this claim, the Nevada Supreme Court set forth the *Blockburger* test.  
10 Exh. 23, p. 3. The Nevada Supreme Court also stated that NRS 200.481 provides that a  
11 person commits the crime of battery by using willful and unlawful force or violence upon  
12 the person of another. While NRS 200.471 is the unlawful attempt to use physical force  
13 against another person or an action that intentionally places another person in reasonable  
14 apprehension of immediate bodily harm. Thus the state supreme court concluded that  
15 “[b]ecause assault and battery require different elements and seek to punish different  
16 harms, convictions for both crimes do not violate the Double Jeopardy Clause.” *Id.* (citing  
17 *State v. Carter*, 379 P.2d 945, 947 n.3 (Nev. 1963) (“... the charge of assault with a deadly  
18 weapon does not necessarily include a battery . . .”). The Nevada Supreme Court  
19 explained:  
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22 The gravamen of assault is inducing fear or apprehension of bodily  
23 harm, while the gravamen of battery is causing actual bodily contact through  
24 force or violence . . . Here, the State charged Peters with battery for the  
25 three times that he actually stabbed Gibson, whereas the assault charge  
26 was based on the one or two times that Peters swung at Gibson but did not  
27 make bodily contact. Although both actions occurred during the same  
28 attack, Peters engaged in two separate illegal acts.

*Id.* at 3-4.

1 As set forth above, the assault and battery are separate and distinct criminal  
2 offenses. Thus, Peters has failed to demonstrate that the Nevada Supreme Court's  
3 decision was contrary to, or involved an unreasonable application of, federal law  
4 established by the United States Supreme Court. 28 U.S.C. § 2254(d). Accordingly,  
5 ground 1 is denied.  
6

## 7 **Ground 2**

8 Peters contends that the trial court erroneously instructed the jury regarding the  
9 presumption of innocence, and therefore, improperly lessened the prosecutor's burden to  
10 prove all elements of the charged offenses beyond a reasonable doubt in violation of  
11 Peters' Sixth and Fourteenth Amendment rights (ECF No. 8, pp. 15-16).  
12

13 To obtain relief based on an error in instructing the jury, a habeas petitioner must  
14 show the "instruction by itself so infected the entire trial that the resulting conviction  
15 violates due process." *Estelle v. McGuire*, 502 U.S. 62, 72 (1991) (citing *Cupp v.*  
16 *Naughten*, 414 U.S. 141, 147 (1973)). Where the defect is the failure to give an  
17 instruction, the inquiry is the same, but the burden is even heavier because an omitted or  
18 incomplete instruction is less likely to be prejudicial than an instruction that misstates the  
19 law. See *Henderson v. Kibbe*, 431 U.S. 145, 155-157 (1977); see also *Estelle*, 502 U.S.  
20 at 72. The Constitution does not require courts to utilize "any particular form of words" in  
21 instructing the jury of the government's burden of proof. *Victor v. Nebraska*, 511 U.S. 1,  
22 5 (1994). Rather, "taken as a whole, the instructions [must] correctly convey the concept  
23 of reasonable doubt to the jury." *Id.* (citing *Holland v. United States*, 348 U.S. 121, 140  
24 (1954)) (alterations in original).  
25  
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28

1 The state court record reflects that the district court instructed the jury that “[t]he  
2 defendant is presumed innocent until the contrary is proved” instead of “the defendant is  
3 presumed innocent unless the contrary is proved.” Exh. 13, jury instruction no. 5.  
4 Defense counsel had objected to proposed jury instruction no. 5 and requested that the  
5 court change it to read “unless the contrary is proved” instead of “until the contrary is  
6 proved.” Exh. 12, pt. 2, p. 41. The district court denied the request. *Id.*

8 Affirming the convictions, the Nevada Supreme Court stated that the jury  
9 instruction complied with Nevada law and noted that it had approved this exact jury  
10 instruction in *Blake v. State*, 121 P.3d 567, 580 (Nev. 2005). Exh. 23, p. 8.

11 Peters maintains that the instruction undermined the State's burden of proof  
12 because the word “until” implies it was inevitable that he would be convicted.  
13 Respondents state that the United States Supreme Court has not directly addressed the  
14 use of the phrase “innocent until proven guilty” as opposed to the use of “unless” as Peters  
15 urges (ECF No. 37, p. 10). Moreover, while not dispositive, they point out that many  
16 Supreme Court cases use “innocent until proven guilty” in their discussion of the  
17 presumption of innocence. See *Neely v. Pennsylvania*, 411 U.S. 954, 958 (1973) (“a  
18 defendant is presumed innocent until proved guilty. Moreover, due process of law  
19 requires that a person be convicted by proof beyond all reasonable doubt”); see also  
20 *Betterman v. Montana*, \_\_\_ U.S. \_\_\_, 136 S.Ct. 1609, 1613 (2016); *Estelle*, 425 U.S. at  
21 518-19; *Lerner v. Casey*, 357 U.S. 399, 413 (1958); *Andres v. U.S.*, 333 U.S. 740, 744  
22 n.5 (1948).

25 Peters has not demonstrated that the Nevada Supreme Court’s adjudication of  
26 federal ground 2 resulted in a decision that was contrary to, or involved an unreasonable  
27 application of, clearly established federal law, as determined by the Supreme Court of the  
28

1 United States, or resulted in a decision that was based on an unreasonable determination  
2 of the facts in light of the evidence presented in the state court proceeding. 28 U.S.C. §  
3 2254(d). Federal habeas relief as to ground 2 is denied.

### 4 **Ground 3**

5 Peters alleges that his trial counsel rendered ineffective assistance in violation of  
6 his Sixth and Fourteenth Amendment rights (ECF No. 8, pp. 16-20). Ineffective  
7 assistance of counsel (IAC) claims are governed by the two-part test announced in  
8 *Strickland v. Washington*, 466 U.S. 668 (1984). In *Strickland*, the Supreme Court held  
9 that a petitioner claiming ineffective assistance of counsel has the burden of  
10 demonstrating that (1) the attorney made errors so serious that he or she was not  
11 functioning as the “counsel” guaranteed by the Sixth Amendment, and (2) that the  
12 deficient performance prejudiced the defense. *Williams*, 529 U.S. at 390-91 (citing  
13 *Strickland*, 466 U.S. at 687). To establish ineffectiveness, the defendant must show that  
14 counsel’s representation fell below an objective standard of reasonableness. *Id.* To  
15 establish prejudice, the defendant must show that there is a reasonable probability that,  
16 but for counsel’s unprofessional errors, the result of the proceeding would have been  
17 different. *Id.* A reasonable probability is “probability sufficient to undermine confidence in  
18 the outcome.” *Id.* Additionally, any review of the attorney’s performance must be “highly  
19 deferential” and must adopt counsel’s perspective at the time of the challenged conduct,  
20 in order to avoid the distorting effects of hindsight. *Strickland*, 466 U.S. at 689. It is the  
21 petitioner’s burden to overcome the presumption that counsel’s actions might be  
22 considered sound trial strategy. *Id.*

23 Ineffective assistance of counsel under *Strickland* requires a showing of deficient  
24 performance of counsel resulting in prejudice, “with performance being measured against  
25



1 an objective standard of reasonableness, . . . under prevailing professional norms.”  
2 *Rompilla v. Beard*, 545 U.S. 374, 380 (2005) (internal quotations and citations omitted).  
3 When the ineffective assistance of counsel claim is based on a challenge to a guilty plea,  
4 the *Strickland* prejudice prong requires a petitioner to demonstrate “that there is a  
5 reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and  
6 would have insisted on going to trial.” *Hill v. Lockhart*, 474 U.S. 52, 59 (1985).  
7

8 If the state court has already rejected an ineffective assistance claim, a federal  
9 habeas court may only grant relief if that decision was contrary to, or an unreasonable  
10 application of, the *Strickland* standard. See *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003).  
11 There is a strong presumption that counsel’s conduct falls within the wide range of  
12 reasonable professional assistance. *Id.*  
13

14 The United States Supreme Court has described federal review of a state supreme  
15 court’s decision on a claim of ineffective assistance of counsel as “doubly deferential.”  
16 *Cullen*, 563 U.S. at 190 (quoting *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009)). The  
17 Supreme Court emphasized that: “We take a ‘highly deferential’ look at counsel’s  
18 performance . . . through the ‘deferential lens of § 2254(d).’” *Id.* at 1403 (internal citations  
19 omitted). Moreover, federal habeas review of an ineffective assistance of counsel claim  
20 is limited to the record before the state court that adjudicated the claim on the merits.  
21 *Cullen*, 563 U.S. at 181-84. The United States Supreme Court has specifically reaffirmed  
22 the extensive deference owed to a state court’s decision regarding claims of ineffective  
23 assistance of counsel:  
24

25  
26 Establishing that a state court’s application of *Strickland* was  
27 unreasonable under § 2254(d) is all the more difficult. The standards  
28 created by *Strickland* and § 2254(d) are both “highly deferential,” *id.* at 689,  
104 S.Ct. 2052; *Lindh v. Murphy*, 521 U.S. 320, 333, n.7, 117 S.Ct. 2059,  
138 L.Ed.2d 481 (1997), and when the two apply in tandem, review is  
“doubly” so, *Knowles*, 556 U.S. at 123. The *Strickland* standard is a general

1 one, so the range of reasonable applications is substantial. 556 U.S. at 124.  
2 Federal habeas courts must guard against the danger of equating  
3 unreasonableness under *Strickland* with unreasonableness under §  
4 2254(d). When § 2254(d) applies, the question is whether there is any  
5 reasonable argument that counsel satisfied *Strickland's* deferential  
6 standard.

7 *Harrington*, 562 U.S. at 105. "A court considering a claim of ineffective assistance of  
8 counsel must apply a 'strong presumption' that counsel's representation was within the  
9 'wide range' of reasonable professional assistance." *Id.* at 104 (quoting *Strickland*, 466  
10 U.S. at 689). "The question is whether an attorney's representation amounted to  
11 incompetence under prevailing professional norms, not whether it deviated from best  
12 practices or most common custom." *Id.* (internal quotations and citations omitted).

### 13 **Ground 3(a)**

14 Peters argues that his counsel failed to retain a defense expert in neurology and  
15 psychological assessment to evaluate and develop trial defenses and mitigation material  
16 even though Peters had been diagnosed with bipolar disorder, schizophrenia, and  
17 paranoia and had suicidal ideations (ECF No. 8, pp. 16-18). Peters alleges that he was  
18 not receiving treatment at the time of the offense. Peters contends that his counsel was  
19 on notice that such investigation might bear fruit because the state district court required  
20 a competency evaluation. *Id.*

21 The state-court record reflects that on October 23, 2009, the state district court  
22 entered an order based on the initial assessments of two psychologists and/or  
23 psychiatrists, finding that commitment was required for a determination as to Peters'  
24 ability to receive treatment and achieve competency. Exhs. 7, 42, 43. At a December  
25 31, 2009 status hearing, Peters' counsel indicated that Peters had been deemed  
26 competent. Exhs. 8, 44, 45. The state district court order finding Peters competent was  
27 filed on January 22, 2010. Exh. 9. The presentence investigation report states that Peters  
28 had been diagnosed as bi-polar, schizophrenic and paranoid and that Peters was not  
receiving treatment or taking medications at the time of the report. It also states that  
Peters said he was under the influence of alcohol and marijuana when he committed the

1 offense, and responding officers noted that he smelled strongly of alcohol. Exh. 40. At  
2 the sentencing hearing, defense counsel referenced what he described as Peters'  
3 documented, long history of mental illness and substance abuse and asked the court to  
4 sentence Peters to probation with an inpatient program to deal with alcohol and mental  
5 health issues. Exh. 17, pp. 8-9. Counsel told the court that he and a social worker spoke  
6 with Peters' family and according to the family:

7           Peters was raised by a single mother. His father abandoned the family  
8 as a – when he was still a baby. He did spend a significant amount of time  
9 of his youth in an actual – actually in a homeless shelter. Now when we  
10 take that and couple that with the underlying mental health aspects, I – I  
11 think that we see that this is somebody who was set up for failure.

12           His family has indicated that he has had a lot of problems dealing with  
13 these mental health concerns. He has not had the opportunity to receive  
14 the treatment that he probably needs for those.

15 *Id.* at 9.

16           In denying Peters' state postconviction petition, the district court found that he set  
17 forth only bare allegations, that the fact that Peters may have had mental health issues  
18 did not render him mentally incompetent to stand trial and pointed out that a competency  
19 evaluation had been completed and Peters was deemed competent to stand trial. Exh.  
20 30, p. 5.

21           The Nevada Supreme Court affirmed the denial of this claim:

22           Appellant's bare claims have failed to demonstrate deficiency or  
23 prejudice. Appellant had been found competent to stand trial, and he did  
24 not allege any facts that should have led reasonable counsel to question  
25 that finding. Appellant also failed to state what the impact of his mental  
26 illnesses were on his ability to appreciate the consequences of his actions  
27 or how testimony to that effect would have affected the outcome of trial. We  
28 therefore conclude that the district court did not err in denying this claim.

Exh. 36, p. 3.

          Respondents filed their answer to this federal petition on June 8, 2016 (ECF No.  
37). Peters, through counsel, filed his reply on September 28, 2016 (ECF No. 44). Just  
eight days before filing the reply, Peters filed supplemental exhibits in support of the

1 amended petition (ECF No. 45). These exhibits included a May 18, 2016 assessment of  
2 Peters by a neuropsychologist. Exh. 47. Peters urges that this court may consider this  
3 recent assessment in support of ground 3(a) based on anticipatory default principles and  
4 under *Cullen v. Pinholster*, 563 U.S. 170 (2011), *Dickens v. Ryan*, 740 F.3d 1302 (2014),  
5 and *Martinez v. Ryan*, 566 U.S. 1 (2012).

6 This report, completed more than seven years after the charged incident took  
7 place, notes that Peters' medical problems include sciatica, hernia, bipolar disorder, and  
8 hypothyroidism. Exh. 47, p. 3. The report states that Peters reported a history of heavy  
9 alcohol and marijuana use. It opines that, seven years earlier, Peters' mental health  
10 issues would have predicted poor judgment, inability to respond to basic reasoning, and  
11 impulsive behavior, contributing to the incident. *Id.* at 6.

12 This court notes that, on the one hand, the pre-commitment evaluators  
13 recommended that Peters—who had been in custody for five months without any mental  
14 health treatment—be placed in Lake's Crossing psychiatric facility. However, less than  
15 two months later, psychiatric evaluators found that Peters was competent, including that  
16 he was able to provide recent and past personal history, recall details of recent and past  
17 personal events, and describe the charges against him and the legal process. Exhs. 44,  
18 45.

19 Further, the trial testimony reflected that Peters knew at least some of the people  
20 at the barbecue, asked an acquaintance for and was given a cigarette, then asked for  
21 more cigarettes and beer and became angry when these requests were denied. His  
22 mental health issues may well have contributed to his subsequent actions of kicking over  
23 the grill and ultimately returning with a kitchen knife and stabbing the victim. But even  
24 assuming, without deciding, that the new assessment is properly before the court, it would  
25 be insufficient to show that counsel was deficient and Peters was prejudiced. Nothing in  
26 the 2016 report—again, seven years after the incident--indicates such serious mental  
27 illness that reasonably could have led to a different jury verdict. Peters has not  
28 demonstrated that he was prejudiced by trial counsel failing to retain a mental health

1 expert. Thus, Peters has not demonstrated that the Nevada Supreme Court's  
2 determination was contrary to or involved an unreasonable application of *Strickland*, or  
3 was based on an unreasonable determination of the facts in light of the evidence  
4 presented in the state court proceeding. 28 U.S.C. § 2254(d).

5 **Ground 3(b)**

6 Peters claims that counsel failed to adequately investigate the case and prepare  
7 for trial and sentencing. He notes that his counsel waited until weeks before trial to file a  
8 motion seeking exculpatory and impeachment evidence and argues that counsel did not  
9 adequately communicate with him. Peters states that he requested that his counsel file  
10 certain motions and conduct specific investigation regarding his defense of mutual  
11 combat and that he asked his attorney for a copy of his preliminary transcript and medical  
12 reports, all to no avail. Peters contends that because of the lack of communication,  
13 counsel was unable to find witnesses or other exculpatory sources (ECF No. 8, pp. 17-  
14 18).

15 Peters' counsel elicited the following testimony at trial. A guest at the barbecue  
16 where the events at issue took place testified on cross-examination that she did not know  
17 who the person with the knife was. Exh. 12, pt. 1, p. 42. Another barbecue guest testified  
18 on cross that he only saw the two people fighting with fists. *Id.* at 53. The victim testified  
19 that when he was back-pedaling to try to get away from Peters, he backed into or was  
20 grabbed from behind by the victim's friend George, who was also barbecuing with them.  
21 *Id.* at 113. Defense counsel highlighted inconsistencies between the alleged victim's  
22 statement to police, preliminary hearing testimony, and trial testimony. *Id.* at 83-94. In  
23 response to defense questioning, the victim grew increasingly agitated, then began  
24 asking his own questions and refusing to answer questions and refusing to do as directed  
25 by the court. The court then called a recess. On cross-examination, defense counsel  
26 elicited testimony from one of the responding police officers that he did not find a knife at  
27 the scene or on Peters' person. Exh. 12, pt. 2, p. 139, 142. Responding to defense  
28 questioning, the officer stated that, although he had testified on direct that Peters tried to

1 run away from officers, he did not include that in the incident report. *Id.* at 142-143.  
2 Another responding officer testified that he believed that the victim was either intoxicated  
3 or under the influence of a controlled substance. *Id.* at 162. In closing argument, defense  
4 counsel argued that the eye witness testimony showed that they were not sure of what  
5 happened and that the State failed to prove beyond a reasonable doubt that the kitchen  
6 knife in question constituted a deadly weapon. He also argued that in the confusion, it  
7 was possible that Gibson was actually injured when he backed into George, who had  
8 been grilling and might have been holding barbecue tongs or a fork. *Id.* at 184-187.

9         Rejecting the claim that trial counsel was ineffective for failing to adequately  
10 investigate and prepare for trial—including developing an alibi—the state district court  
11 found that Peters offered no specific evidence or information that would have resulted  
12 from any further investigation, and counsel could not make up an alibi where none existed.  
13 Exh. 30, pp. 6-7. The court found that the record clearly demonstrated that defense  
14 counsel was adequately prepared to cross examine each State’s witness and cited  
15 several specific inconsistencies in the victim’s testimony that defense counsel highlighted.  
16 The court noted that defense counsel elicited the police testimony that no knife was found,  
17 that the victim appeared intoxicated—contrary to the victim’s testimony—and that the  
18 arrest reports did not indicate that Peters tried to flee or resisted arrest. The court  
19 concluded that Peters’ claim that his counsel failed to present any defense was belied by  
20 the record and was baseless. *Id.*

21         The Nevada Supreme Court also rejected Peters’ claim:

22                 Appellant’s bare claims have failed to demonstrate deficiency or  
23 prejudice. Appellant complains that counsel did not respond to a letter in  
24 which appellant requested that some motions be filed and investigation be  
25 conducted and that counsel did not provide requested copies of preliminary  
26 hearing transcripts or the victim’s medical records. Appellant did not state  
27 what motions he wanted filed, what investigation counsel should have  
undertaken, what the outcomes of either of those actions would have been,  
or how counsel’s taking any of the aforementioned actions could have  
affected the outcome of the trial.

28         Exh. 36 at 4.

1 Peters has not demonstrated that the Nevada Supreme Court's determination was  
2 contrary to or involved an unreasonable application of Strickland, or was based on an  
3 unreasonable determination of the facts in light of the evidence presented in the state  
4 court proceeding. 28 U.S.C. § 2254(d).

5 **Ground 3(c)**

6 Peters argues that his trial counsel failed to bring the case to trial within a  
7 reasonable time. He claims that he had no choice but to waive his Sixth Amendment right  
8 to a speedy trial when it was clear his counsel was not ready to go to trial (ECF No. 8, pp.  
9 19-20).

10 The state district court pointed out that Peters decided to waive his speedy trial  
11 right and requested a competency evaluation, which delayed the trial. Exh. 30, pp. 9-10.  
12 The court noted that at the same time Peters complained his right to a speedy trial was  
13 violated, he was also claiming counsel was ineffective for failing to investigate his mental  
14 health and competency issues further. Finally, the court found that Peters received credit  
15 for time served and failed to demonstrate any prejudice or any reasonable likelihood of a  
16 better result if he had been tried sooner. *Id.*

17 The Nevada Supreme Court affirmed the denial of this claim, explaining that Peters  
18 did not demonstrate that it was objectively unreasonable for counsel to move to continue  
19 the trial in order to be prepared and that Peters' bare claim that the continuance gave the  
20 State more time to investigate failed to specify what additional information the State  
21 uncovered or how any such information affected the trial result. Exh. 36, pp. 3-4.

22 Peters has not demonstrated that the Nevada Supreme Court's determination was  
23 contrary to or involved an unreasonable application of Strickland, or was based on an  
24 unreasonable determination of the facts in light of the evidence presented in the state  
25 court proceeding. 28 U.S.C. § 2254(d). Accordingly, federal habeas relief is denied as  
26 to grounds 3(a), 3(b), and 3(c).

27 **IV. Certificate of Appealability**  
28

1 This is a final order adverse to the petitioner. As such, Rule 11 of the Rules  
2 Governing Section 2254 Cases requires this court to issue or deny a certificate of  
3 appealability (COA). Accordingly, the court has *sua sponte* evaluated the claims within  
4 the petition for suitability for the issuance of a COA. See 28 U.S.C. § 2253(c); *Turner v.*  
5 *Calderon*, 281 F.3d 851, 864-65 (9th Cir. 2002).

6 Pursuant to 28 U.S.C. § 2253(c)(2), a COA may issue only when the petitioner  
7 "has made a substantial showing of the denial of a constitutional right." With respect to  
8 claims rejected on the merits, a petitioner "must demonstrate that reasonable jurists would  
9 find the district court's assessment of the constitutional claims debatable or wrong." *Slack*  
10 *v. McDaniel*, 529 U.S. 473, 484 (2000) (citing *Barefoot v. Estelle*, 463 U.S. 880, 893 & n.4  
11 (1983)). For procedural rulings, a COA will issue only if reasonable jurists could debate  
12 (1) whether the petition states a valid claim of the denial of a constitutional right and (2)  
13 whether the court's procedural ruling was correct. *Id.*

14 Having reviewed its determinations and rulings in adjudicating Peters' petition, the  
15 court finds that none of those rulings meets the *Slack* standard. The court therefore  
16 declines to issue a certificate of appealability for its resolution of any of Peters' claims.

17 **V. Conclusion**

18 **IT IS THEREFORE ORDERED** that petitioner's amended petition (ECF No. 8) is  
19 **DENIED** in its entirety.

20 **IT IS FURTHER ORDERED** that a certificate of appealability is **DENIED**.

21 **IT IS FURTHER ORDERED** that the Clerk shall enter judgment and close this case.

22 **DATED:** July 18, 2018.



24 **RICHARD F. BOULWARE, II**  
25 **UNITED STATES DISTRICT JUDGE**